UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NORMAN SHELBY BRISTOW,	Case No. 2:15-cv-14376-DPH-DRG
and	Hon. Denise Page Hood
SALLY ANN BRISTOW,	Mag. David R. Grand
Plaintiffs,	
v.	
SPIRIT AIRLINES, INC.,	
Defendant.	

BRISTOW LAW, PLLC
By: Kyle James Bristow (P77200)
P.O. Box 381164
Clinton Twp., MI 48038
(P): (248) 838-9934
(E): bristowlaw@gmail.com
Attorney for Plaintiffs

JAFFE, RAITT, HEUER & WEISS, P.C.
Scott R. Torpey (P36179)
Timothy J. O'Connell (P79737)
Justin M. Schmidt (P78125)
27777 Franklin Rd., Ste. 2500
(P): (248) 351-3000
(F): (248) 351-3082
(E): storpey@jaffelaw.com
(E): jschmidt@jaffelaw.com
(E): toconnell@jaffelaw.com
Attorneys for Defendant

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO SET ASIDE DEFAULT

NOW COMES Norman Shelby Bristow and Sally Ann Bristow (collectively "Plaintiffs"), by and through the undersigned attorney, and hereby propounds upon Spirit Airlines, Inc. ("Defendant"), and this Honorable Court Plaintiffs' Response to Defendant's Motion to Set Aside Default:

1. No contest.

2. No contest, but Plaintiffs further aver that Defendant's resident agent was provided the Summons and Complaint and not the document attached as Exhibit B of Defendant's Motion.

3. No contest.

4. No contest.

5. No contest, but Plaintiffs further aver that it is irrelevant as to whether it was Plaintiffs' counsel or the court clerk *sua sponte* who entered default against Defendant. Defendant was late with answering Plaintiffs' Summons and Complaint—period.

6. No contest.

7. No contest, but Plaintiffs further aver that Defendant's Notice of Removal constitutes an abuse of process insofar as this Court does not enjoy diversity jurisdiction for the reasons set forth in Plaintiffs' Motion to Remand. (Docket No. 3). As set forth in the attached memorandum, Michigan trial courts do not readily set aside entries of default and Defendant appears to be trying to get this Court to set

aside the default entered against Defendant before the case is remanded back to Michigan state court where it belongs.

8. Plaintiffs lack knowledge or information sufficient to form a belief as to the truth of the matters alleged in Paragraph 8 of Defendant's Motion. Plaintiffs further aver, however, that the 41-B Judicial District Court Clerk signed the Entry of Default's Proof of Service, and unless Defendant is prepared to argue that said clerk committed a fraud, then the Proof of Service from said Clerk should suffice. (Docket No. 4-4).

9. No contest, but Plaintiffs further aver that Plaintiffs' attorney attempted to file a motion for default judgment against Defendant at the 41-B Judicial District Court on December 21, 2015, but was unable to do so because Defendant had already removed the instant civil action to the Eastern District of Michigan. Plaintiffs' attorney would like to note that Plaintiffs did not receive as of December 21, 2015, service of Defendant's Notice of Removal, which Defendant allegedly served upon Plaintiffs' attorney via U.S. Mail and Electronic Mail on December 17, 2015.

10. No contest that Defendant is seeking an order to vacate the 41-B Judicial District Court's Entry of Default, but Plaintiffs submit that said Default should not be set aside for the reasons set forth in the attached memorandum.

11. No contest that Defendant is relying on its Brief in Support and the Affidavit of Carmen Paul, but Plaintiffs further aver that Paul's Affidavit is irrelevant—

Defendant was properly served with process, Defendant did not timely respond to Plaintiff's Complaint or even try to contact Plaintiffs' attorney prior to filing Defendant's frivolous Notice of Removal, and Defendant itself had actual knowledge of the pendency of the instant civil action as evidenced by that which is claimed within Defendant's Motion. If Defendant's insurance carrier was negligent as Defendant purports in its Motion to Set Aside the Default, then Defendant should consider suing their insurance carrier for malpractice.

12. No contest that Defendant may file a Fed. R. Civ. P. 12(b)(6) motion in the future, but Plaintiffs further aver that said motion would be frivolous on the basis that the instant case should be remanded back to state court without the Default being set aside, and due to Defendant being defaulted, Defendant has already admitted liability when the case is eventually remanded back to Michigan state court pursuant to *American Central Corp v Stevens Van Lines, Inc*, 103 Mich App 507, 512; 303 NW2d 234 (1981). If Defendant remains in Default as it should, then no motion for summary judgment could be filed by Defendant.

13. Denied as untrue.

WHEREFORE, Plaintiffs pray that this Court will deny *in toto* the relief requested within Defendant's Motion to Set Aside the Default. **Alternatively, Plaintiffs pray that this Court will hold its decision concerning Defendant's**

Motion to Set Aside the Default in abeyance until after the Court has ruled on Plaintiffs' Motion to Remand the instant case back to the trial court.[1]

Respectfully submitted,

BRISTOW LAW, PLLC

/s/ Kyle James Bristow
Kyle James Bristow (P77200)
P.O. Box 381164
Clinton Twp., MI 48038
(P): (248) 9934
(E): BristowLaw@gmail.com
Attorney for Plaintiffs

Dated: December 22, 2015

[1] If this Court sets aside the Default against Defendant but then grants Plaintiffs' previously filed and pending Motion to Remand on the basis that the Court lacks subject matter jurisdiction insofar as diversity jurisdiction is inapplicable, then any orders of the Court would be voidable, if not void. Holding Defendant's Motion to Set Aside the Default in abeyance until after the Court rules on Plaintiffs' Motion to Remand is in the interest of judicial economy and the Parties' economies.

MEMORANDUM IN SUPPORT

I. STATEMENT OF FACTS

Plaintiffs sued Defendant in the State of Michigan's 41-B Judicial District Court on November 16, 2015, for the total sum of twenty-five thousand dollars ($25,000.00). On November 19, 2015, Plaintiffs properly served Defendant's Michigan-based resident agent with the Summons and Complaint. Defendant's first responsive pleading to Plaintiffs' Summons and Complaint was due on or before December 10, 2015, Defendant did not timely provide a response, and on December 11, 2015, Plaintiffs' attorney successfully requested that the 41-B Judicial District Court Clerk enter Default against Defendant.

On December 17, 2015, Defendant filed its Notice of Removal, which purports that the instant controversy between Plaintiffs and Defendant involves a sum of over seventy-five thousand dollars ($75,000.00) and that diversity jurisdiction exists. (Docket No. 1). On December 21, 2015, Plaintiffs filed their Motion to Remand on the basis that the Court lacks subject matter jurisdiction over the case at bar on the basis that Plaintiffs are only seeking twenty-five thousand dollars ($25,000.00) and declaratory relief. (Docket No. 3).

On December 21, 2015, Defendant filed its Motion to Set Aside the Default. (Docket Entry No. 4). Defendant purports in its Motion that it was properly served with process, that it did not timely file a response, that Defendant is in Default, and that Defendant being in Default is due to the neglect of Defendant's insurance carrier. (Docket No. 4).

II. LAW & ARGUMENT

It is clear why Defendant removed the case to federal court by falsely alleging that diversity jurisdiction exists instead of filing a motion to set aside the entry of default in state court: while setting aside entries of default are favored in federal courts—*United Coin Meter Co, Inc v Seaboard Coastline R.R.*, 705 F2d 839, 845 (6th Cir. 1983)—, they are highly disfavored in Michigan state courts—*Ferguson v Delaware Int'l Speedway*, 164 Mich App 283, 295; 416 NW2d 415 (1987) (policy in Michigan is against setting aside properly entered defaults and default judgments). It appears that Defendant removed the instant case to federal court and swiftly moved to set aside the Default in attempt to get the Default vacated before the case is remanded back to Michigan state court where the Default would otherwise remain in effect. As such, it is respectfully requested of this Court that the Court hold its decision of Defendant's Motion to Set Aside the Entry of Default in abeyance until after the Court has ruled on Plaintiffs' Motion to Remand. It is not just nor equitable for Defendant to abuse legal process to procure the setting aside of the Default by filing its frivolous Notice of Removal and taking advantage of federal procedural law prior to the case being remanded back to state court where the law is not as favorable to Defendant.

Notwithstanding the foregoing, although the Court has discretion to set aside Defendant's Default—assuming, *arguendo*, that the Court enjoys subject matter jurisdiction over the instant controversy—, it is respectfully submitted that the Court should not set aside the Default. Plaintiffs are seeking a relatively *de minimis* sum of money for the ordeal that Defendant subjected Plaintiffs to as described within Plaintiff's Complaint, and instead of timely responding to Plaintiffs' Summons and Complaint or trying to amicably resolve the case on equitable terms, Defendant has tried to offend judicial economy and Plaintiffs' economies as much as possible via (1) Defendant not having timely filed a responsive pleading to Plaintiffs' Complaint, (2) Defendant having filed its frivolous Notice of Removal, (3) Defendant consuming Plaintiffs' and the Court's time via Defendant's Motion to Set Aside the Entry of Default, and (4) Defendant's threats of forthcoming motions.

Fed. R. Civ. P. 55(c) provides that "The court **may** set aside an entry of default for good cause * * *." (Emphasis added.) If a defendant shows good cause in a motion to set aside a default, then the court would enjoy discretion to or not to set aside said default. Plaintiffs respectfully submit that the Court should not set aside the Default entered against Defendant even if Defendant shows good cause in light of the totality of the circumstances and the allegations contained within Plaintiffs' Complaint.

In the instant case, Defendant purports throughout its Motion to Set Aside the Entry of Default that its insurance carrier was negligent. (Docket No. 4). Defendant is vicariously responsible for the negligent conduct of its agents, and so Defendant's insurance carrier having negligently handled the case demonstrates that Defendant is culpable for the Default being entered against Defendant. As such, the first *United Coin* factor as detailed within Defendant's Motion weighs against the setting aside of the Default. (Docket No. 4, pg. 4-5).

In the instant case, Defendant purports that it has a meritorious defense to the claims raised in Plaintiffs' Complaint, but Defendant fails to states with any real specificity as to what said meritorious defense will be. (Docket No. 4, pg. 6-7). This leaves the Court and Plaintiffs guessing as to what Defendant's meritorious defense is or will be, and thus Defendant has not met its burden of showing that it does indeed have a meritorious defense. Defendant simply states that Plaintiffs' claims are "pre-empted"—by a law not cited by Defendant—and that Defendant has a "contract of carriage"—which Defendant has not attached as an exhibit to its Motion. As such, this *United Coin* factor weights against the setting aside of the Default.

In the instant case, Defendant purports that Plaintiffs will not suffer prejudice should the Court set aside the Clerk's Entry of Default. (Docket No. 4, pg. 7-8). It is respectfully submitted that Defendant is correct, but this is irrelevant insofar as two (2) of the three (3) factors to consider whether good cause exists weigh in Plaintiffs' favor. As such, the Default against Defendant should not be set aside.

III. CONCLUSION

For the reasons set forth herein, the Default that has been entered against Defendant should not be set aside. **Alternatively, the Court should hold its decision concerning Defendant's Motion to Set Aside the Default in abeyance until after the Court has ruled on Plaintiffs' Motion to Remand the instant case back to the trial court.**

Respectfully submitted,

BRISTOW LAW, PLLC

/s/ Kyle James Bristow
Kyle James Bristow (P77200)
P.O. Box 381164
Clinton Twp., MI 48038
(P): (248) 9934
(E): BristowLaw@gmail.com
Attorney for Plaintiffs

Dated: December 22, 2015

CERTIFICATE OF SERVICE

I, Kyle James Bristow (P77200), affirm that I am an attorney of record for a party to the above-captioned civil action and that on December 22, 2015, I submitted the foregoing documents to the Court's Electronic Filing System, which should serve said documents on all attorneys of record.

/s/ Kyle James Bristow
Kyle James Bristow (P77200)
P.O. Box 381164
Clinton Twp., MI 48038
(P): (248) 9934
(E): BristowLaw@gmail.com
Attorney for Plaintiffs

Dated: December 22, 2015